## QUESTION PRESENTED

*Amici* will address the following question:

In institutional reform litigation, what specific standards should a court apply to assess whether a party seeking modification of a consent decree has carried its burden of justifying the proposed change?

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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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# BRIEF FOR THE INMATES OF THE LORTON CENTRAL FACILITY IN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE *AMICI CURIAE*[1]

*Amici* are inmates confined at the Lorton Central Facility in Lorton, Virginia. The Central Facility is operated by the District of Columbia Department of Corrections. The *amici* constituted the plaintiff class in *Twelve John Does v. District of Columbia*, 80-2136 (D.D.C.), a prisoner class action in which a consent decree was entered in April 1982. The defendant prison officials in that case have sought various amendments to that consent decree and may well seek additional amendments in the future. See, *e.g.*, *Twelve John Does v. District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988) (affirming district court refusal to modify consent decree population lid). *Amici* are interested in developing the proper legal standards for reviewing such modification requests and offer their experience to assist the court in resolving this question.

## STATEMENT OF FACTS

In June 1973, the federal district court in Boston, Massachusetts found that conditions in the Suffolk County Jail in Boston violated the Due Process Clause of the Fourteenth Amendment. Pet. App. 23a-54a. The jail was used to hold pre-trial detainees who had not been convicted of a crime. Among other deficiencies at the jail, the court found that two inmates were often housed in cells designed for single occupancy. This double-celling led to increased violence in the prison, since there was no method for identifying those

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[1]Petitioners and respondents have consented to the filing of this brief. Letters are being filed with the Clerk of the Court herewith.

prisoners who could not safely be housed with other prisoners. Pet. App. 25a-35a. The court concluded that these conditions amounted to unconstitutional punishment of the inmates. *Id.* at 40a.

In May 1979, the parties agreed to a consent decree that provided for the construction of a new jail. Pet. App. 15a-22a. The consent decree incorporated by reference a comprehensive architectural plan describing various features of the new jail, including cells designed for single inmate occupancy. *Id.* at 16a.

The consent decree was modified several times. The number of cells included in the initial plan for the facility was based on projections of a decline in the prison population. 90-954 Pet. 4. By 1985, however, "[t]he parties realized that the projections of the detainee population on which the original plans were based were flawed, and that a jail with a larger capacity would be needed." Pet. App. 7a-8a. The district court's Order of April 11, 1985, which granted the modification request to increase the number of cells in the new prison, states that "single-cell occupancy [must be] maintained." The design was modified again after 1985 to contain 453 cells. 90-954 Pet. 5. Construction of the new jail was completed in 1990.

On July 17, 1989, the Sheriff of Suffolk County moved in district court to modify the consent decree to permit double-celling in 197 of the 282 regular male cells in the new jail. 90-954 Pet. 6. He argued that double-celling was needed because of continuing increases in the pre-trial detainee population, Pet. App. 10a, and that double-celling was constitutional under *Bell v. Wolfish*, 441 U.S. 520 (1979). Pet. App. 8a-9a.

The district court denied the Sheriff's motion. Pet. App. 5a-14a. It stated that under the standard articulated in *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), a clear showing of grievous wrong evoked by new and unforeseen conditions would be needed in order to change the consent decree. Pet. App. 8a. The court found that the increases in the detainee population were "neither new nor unforeseen." Pet. App. 10a.

The court went on to find that under the "flexible" standard applied by some courts of appeals in scrutinizing modification requests, this request would still be denied. Pet. App. 12a. Denial was required, the court found, because the proposed modification would violate one of the primary purposes of the consent decree -- "to ensure that conditions of confinement for the pretrial detainees meet agreed upon standards." Pet. App. 12a. The court stated that "[a] separate cell for each detainee has always been an important element of the relief sought in this litigation -- perhaps even the most important element." Pet. App. 12a.

The court rejected the Sheriff's argument that double-celling would comply with constitutional standards. The court stated that permitting relief on the basis of legal standards as defined outside of the decree would decrease the value of settlements. "It would undermine and discourage settlement efforts in institutional cases if a defendant were permitted to return to court when terms earlier agreed to became more burdensome than expected. It is the very certainty and finality of a consent decree approved by a court that induces participation in it." Pet. App. 12a.

The district court rejected the Sheriff's argument that modification should be allowed because enforcement of the

decree might cause the release of some pretrial detainees. The court found that any release of detainees would be caused by the legislature's choice not to provide the Sheriff with adequate fiscal resources to allow other methods of compliance with the decree. Pet. App. 13a.

The court of appeals affirmed on the basis of the district court's opinion. Pet. App. 1a-2a.

## SUMMARY OF ARGUMENT

Because they are often complex, future-oriented plans, prison consent decrees may require modification in the light of experience and changed circumstances. Because the provisions of such decrees are often interdependent, however, they should be modified cautiously, so as to preserve the carefully bargained balance among decree provisions and thereby achieve the original purposes of the decree. We agree with *amici* the United States and the International City Management Association, *et al.*, that this Court should establish a "flexible" standard for such modification that gives due importance to the original purposes of such decrees, as expressed in the parties' own voluntary agreement.

As the courts of appeals have thus far articulated the flexible standard, however, the standard does not produce uniform results or serve as a reliable guide to judicial discretion. Uniformity would be furthered if this Court articulated the burdens of persuasion that should be placed upon the party seeking modification. Based upon years of experience with several requests for modification of the consent decree governing conditions at the Lorton Central Facility, we propose the following standards:

(1) Changed Circumstances. A party seeking modification should demonstrate first that current circumstances have frustrated compliance with the decree, and that in entering into the decree the party did not agree to accept the risk of such circumstances. Absent a specific decree provision to the contrary, courts should not assume that plaintiff inmates have agreed to accept the risk of unexpected increases in the prison population. Such unexpected increases, however, may justify a *temporary* relaxation of a decree's limitation on prison population, in order to allow defendants to take measures to accommodate the increased population.

(2) Consistency of Modification with the Purposes of the Decree. Next, the moving party should demonstrate that the proposed modification is both necessary to achieve the purposes of the original provision of the decree, and consistent with those purposes. To avoid making motions for modification an occasion for relitigation of the underlying controversy, a court should be guided chiefly by the decree provisions, and not by the supposed purposes of the litigation. To deem the "purposes" of the decree to require strict compliance with the precise terms of each of its provisions, however, produces a circular and inflexible analysis. A court should therefore be mindful of the practical interrelationship between decree provisions, and should allow a modification of the duties imposed upon the moving party if a compensating adjustment in other provisions can be made.

Thus, the party seeking modification should show that the proposed change would disrupt the originally agreed-upon plan of relief to the minimum extent possible, that feasible alternatives to modification would not achieve compliance, and that the primary practical objectives of the decree would be served. A court might appropriately permit modification of a

consent decree's population limit in response to unforeseen increases in the number of prisoners, for example, if the defendant were also required to increase correctional officer staffing during the period of the population increase, and if the defendant were required to take additional measures to accommodate the population increase and reduce overcrowding.

(3) Good Faith Efforts. The moving party should demonstrate its good faith efforts to comply with the decree if there is an issue as to whether compliance has genuinely been frustrated by the unexpected circumstances, or merely by the party's unwillingness to comply. A party's good faith efforts may also indicate whether all feasible alternatives to modification have in fact been explored.

(4) The Public Welfare. If a modification would be inconsistent with the purposes of the original provisions of a prison consent decree, and if no feasible alternatives to modification exist, despite the moving party's good faith efforts to comply, a court should deny modification unless the moving party shows that enforcement of the decree would produce an unacceptable threat to the public welfare. We agree with the *amici* International City Management Association, *et al.*, that the mere fact that a municipal defendant finds compliance more expensive than it originally planned should not ordinarily be a valid basis for granting modification. In disputes about whether to enforce prison population limits, defendants should be required to establish that enforcement of such limits would unavoidably cause the release of inmates who would be a danger to the community. Any modification granted on such grounds should be temporary.

A court should not assume, however, that any court ordered reduction in the incarcerated population would pose an inherently unacceptable risk to the public welfare. The enforcement of consent decree population limits in the District of Columbia has prompted the defendant prison officials to adopt a number of innovative solutions to population management.

Each of the above four elements of our proposed standard is discussed below.

## ARGUMENT

### I. THE COURTS SHOULD APPLY A FLEXIBLE STANDARD OF MODIFICATION THAT RESPECTS THE COMPLEX BARGAINED INTERRELATIONSHIP AMONG CONSENT DECREE PROVISIONS

We do not believe that the modification of consent decrees in institutional reform litigation should be subject to the requirement of *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), that the moving party make "a clear showing of grievous wrong evoked by new and unforeseen conditions." The *Swift* case itself did not call for such an imposing standard in the case of decrees "directed to events to come"; such decrees, the *Swift* Court said, were "subject always to adaptation as events may shape the need." *Swift*, 286 U.S. at 114.

We agree with Judge Friendly's observation that consent decrees in institutional reform cases "are not so much peremptory commands to be obeyed in terms, as they are future-oriented plans designed to achieve broad public policy objectives in a complex, ongoing fact situation." *New York*

*State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 970 n.17. (2d Cir.), *cert. denied*, 464 U.S. 915 (1983) (quoting Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 56 (1982)). Because of the complex, future-oriented nature of such decrees, we agree that the courts should apply a "flexible" standard to requests to modify such decrees, and that modification pursuant to such a flexible standard should be available to both plaintiffs and defendants.

Consent decrees in institutional reform cases, however, must also be generally enforceable according to their terms, so that parties will continue to have an incentive to use such decrees as an efficient method of terminating complex institutional litigation. As the Solicitor General says, it is necessary to recognize and preserve the contractual aspect of institutional consent decrees, for reasons of both fairness and judicial efficiency. Brief for the United States as *Amicus Curiae* at 10-11.

Courts should use caution when they apply a "flexible" modification standard for institutional consent decrees because such decrees are often the product of a painstaking process of negotiating give and take, and the provisions of such consent decrees are often interdependent. For example, the consent decree governing conditions at the Lorton Central Facility, entered in 1982, recognizes explicitly that "all other provisions of this Decree rest fundamentally on the number of residents confined to the facility." The original agreed-upon population limit in the Central Facility decree, which the parties set on an individual basis for each of 25 dormitories on the basis of a number of square feet per inmate, was informed by the parties' recognition that the dormitories did not receive a high level of correctional officer supervision. Such a relative lack

of supervision led to the parties' adoption of a lower population limit than might otherwise have been the case, since it was believed by both sides that crowding in the relatively unsupervised dormitories would increase the level of inmate-on-inmate violence.

When the defendant District of Columbia prison officials sought some years later to place an increased number of officers in the dormitories, and to create officer stations within the dormitories in areas previously used for inmate living space, plaintiff *amici* consented to the increased officer coverage, even though it resulted in a somewhat greater degree of crowding in the dormitories. Because of the increased officer supervision, the number of assaults has declined sharply, and the standard of housekeeping and sanitation has improved, despite the somewhat greater crowding. Since the original practical purposes of the decree were, *inter alia*, to reduce inmate assaults and improve the environmental conditions at the prison, this relaxation of the decree requirements was consistent with, and indeed furthered, the original purposes of the decree.

In an earlier instance, however, we strenuously opposed an attempt by the District of Columbia defendants to increase the population lid. Defendants, because of increased arrests and convictions, placed more inmates in the facility than permitted by the decree, and then sought to modify the decree to ratify the overcrowding. Defendants proposed no increase in security staff, no increase in health services or counselling staff, no improvements to the physical facility, no prison construction or other alternatives to address the growing prison population -- and no time limit for the proposed increase in the population ceiling. Because of the increased population, the number of inmate-on-inmate assaults increased

dramatically, and the number of violations of the local health codes, as noted by defendants' own inspectors, increased markedly as well. The district court refused to allow the requested modification, and the court of appeals affirmed. *Twelve John Does v. District of Columbia*, 861 F.2d 295, 302 (D.C. Cir. 1988) *("Twelve John Does II")*.

These examples demonstrate a common lesson of experience with institutional consent decrees: modifications of such decrees should be responsive to the interrelationships among decree provisions, and modifications that simply seek to reduce the obligations on one party should be disfavored in the absence of a very strong showing of need by the moving party.

## II. THE CURRENT FLEXIBLE MODIFICATION STANDARD IS INADEQUATE BECAUSE IT DOES NOT ACKNOWLEDGE THE CAUTION NEEDED IN MODIFYING THE INTERDEPENDENT PROVISIONS OF CONSENT DECREES AND BECAUSE IT DOES NOT LEAD TO UNIFORM RESULTS

The courts of appeals that have recognized or adopted the "flexible" test have generally required that the moving party make four showings: (i) that there exist "changed circumstances"; (ii) that the requested modification would be consistent with the purposes of the consent decree; (iii) that the moving party has attempted in good faith to comply with the decree; and (iv) that the modification would be consistent

with the public interest.[2] We believe that this commonly employed four-part inquiry is potentially a useful guide to judicial discretion that could give adequate weight to the competing interests of the parties to institutional consent decrees.

The courts of appeals, however, have thus far failed to particularize the four factors sufficiently to provide the "flexible" test with any real meaning. The courts have failed to inquire what sorts of changed circumstances should entitle a party to modification. They have failed to define what is meant by the "original purposes" of a decree, so that some courts have equated such purposes with the purposes of the litigation, and have thereby allowed defendants freely to reopen the underlying constitutional questions that the decree was intended to settle. *E.g.*, *Plyler v. Evatt*, 846 F.2d 208 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988). Others have erred in the opposite direction by interpreting the purposes of a decree to be synonymous with its literal provisions, so that any departure from the terms of the decree is ipso facto inconsistent with its "purposes." The courts have also failed to identify the logical relevance of the "good faith" inquiry,

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2 See, e.g., *Twelve John Does* v. *District of Columbia*, 861 F.2d 295 (D.C. Cir. 1988); *Badgley* v. *Santacroce*, 853 F.2d 50 (2d Cir. 1988); *Ruiz* v. *Lynaugh*, 811 F.2d 856 (5th Cir. 1987); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 706 F.2d 956 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Philadelphia Welfare Rights Org.* v. *Shapp*, 602 F.2d 1114 (3d Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

*Twelve John Does II*, 861 F.2d at 300, or the place of the "public interest" inquiry in the analysis.

A similar variety of interpretations of the flexible test is evident in the briefs submitted by petitioners and several amici. An extreme view of the test is represented by Petitioner Robert C. Rufo. He suggests that one of the major factors a court should consider in support of modification is any adverse effect of the current decree on a public official defendant or the public interest, and that the purposes of the consent decree should be defined in terms of external provisions, including judicial decisions reached after the entry of the consent decree. See Brief of Petitioner Robert C. Rufo at 32. This view, which almost completely ignores the contractual attributes of consent decrees, is supported by the Attorneys General of several states, who suggest that "[a] federal consent decree binding state officials should be modified as necessary to ensure that it is no more intrusive than required to protect federal rights." Brief *Amici Curiae* for the State of Tennessee, *et al.*, at 4. Under such a scheme, the court becomes a perpetual groundskeeper, charged with lopping off decree provisions that stray over the bounds of constitutional minima. The agreement of the parties -- the consent decree -- has essentially no weight in this scheme.

A more sensible balance is suggested by the Solicitor General, with whom we generally agree. He proposes that defendants be required to show "that the requested modification is suitably tailored to adapt the decree to pertinent changes in circumstances, and is in keeping with the essential purposes of the decree," while not depriving the other party "of the benefit of its bargain." Brief for the United States as *Amicus Curiae* at 29. The "less burdensome alternative" approach suggested by the *amici* state, county and

municipal government organizations also seeks to balance the contractual and judicial decree sides of consent decrees. Brief of International City Management Association, *et al.* as *Amici Curiae* at 11.

The Solicitor General has provided a usefully balanced discussion of the competing interests at stake. The test he ultimately suggests, however, while it rests upon the four-part framework, gives almost unbridled scope to judicial discretion. The Solicitor General's test would allow modifications that are "suitably tailored," in response to "pertinent" changes in circumstances, if they are in keeping with the "essential" purposes of the decree, but the court would be left with little guidance as to what adjectives such as "suitable," pertinent," and "essential" mean in the individual case. Brief of the United States as *Amicus Curiae* at 29.

This case presents the Court with an opportunity to refine the four-part test and to make the test a useful guide to the lower courts. The Court should make clear that the moving party bears the burden of demonstrating the need for modification, and that the moving party accordingly bears the burden of persuasion as to each of the four commonly applied factors. We submit that the following discussion of the substantive content and logical workings of the four-part modification standard may help in making the test a more uniform and principled one.

## III. THE COURTS SHOULD APPLY A FOUR-STEP ANALYSIS THAT TAKES INTO ACCOUNT THE SPECIAL FEATURES OF INSTITUTIONAL CONSENT DECREES

### A. To Support a Modification, the Moving Party Should Show That Compliance Is Not Possible Due to Changed Circumstances and That It Did Not Assume the Risk of Such Changed Circumstances Under the Consent Decree

The Court in *Swift* stated what ought to be true of the modification of any consent decree, whether involving institutional reform litigation or otherwise: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The [decree], whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making." *Swift*, 286 U.S. at 119. Consistent with this principle, the party seeking modification must demonstrate that circumstances have changed since the entry of the decree. If the moving party seeks merely to evade duties that were imposed to remedy conditions that existed at the time of the entry of the decree and that have not changed substantially in the interim, then the court may properly conclude that the moving party is seeking "to reverse under the guise of readjusting," and deny the request for modification. *Id.*

Even if the moving party shows that conditions have changed since the entry of the decree, the court should still inquire whether the moving party nonetheless ought in fairness to bear the burden of such changed conditions. Where a consent decree contains a population-limiting provision, for example, the courts have generally held quite properly that *foreseeable* increases in population do not constitute good cause to increase a consent decree's population limit. See *Ruiz*, 811 F.2d at 862-63 (modification request to use temporary facilities that did not meet consent decree standards rejected because defendants could foresee increased prison

population at time of entry into decree); *Twelve John Does II*, 861 F.2d at 297 (upholding district court denial of modification based on prison overcrowding which had been anticipated).

But the converse is not necessarily true: unanticipated population increases ought not to be a reason for a permanent relaxation of a decree's population requirements, although some courts have erred in so holding. See, *e.g.*, *Plyler*, 846 F.2d at 212 (granting permanent modification). Absent a consent decree provision to the contrary, a court ought not to presume that plaintiff inmates have agreed to undertake the burden of greater crowding if the number of incarcerated persons increases unexpectedly. Instead, the governmental defendant ought normally to be deemed to have undertaken to provide the conditions agreed upon at the institution in question, and to take whatever additional measures are necessary to accommodate increases in the inmate population. That was apparently the assumption of the parties in this case when they increased the population limit in their consent decree in recognition of the fact that the Sheriff's initial population projections had been low. Pet. App. 7a-8a; 90-954 Pet. 5.

Of course, the governmental defendant's ability to increase correctional capacity in step with the increasing population may be affected by *unexpected* population increases. But the difficulties that such unexpected increases cause should not be a reason for *permanently* shifting the burden of increased crowding onto the plaintiff inmates -- such increases would justify at most a temporary relaxation of the decree's requirements sufficient to permit defendants to take the necessary measures to accommodate the increased population.

Other changed conditions may support a permanent change in the terms of the consent decree. For instance, a change the nature of the prison population may affect the appropriate population lid: A maximum security population may require a lower ceiling, especially in a case like this one, where adequate security for double-celled inmates cannot be provided by the staff because of the design of the prison. See 90-954; 90-1004 Resp. 9. ("The cells have doors, not bars, with a narrow window. The door was designed to maximize the detainee's privacy .... [t]he window provides a wide field of vision from the outside *only* if the observer is immediately adjacent to the door.") (citations omitted). However, if a minimum security population, perhaps consisting of older inmates or misdemeanants, were moved into the same prison, such changed circumstances might justify housing more prisoners in the same space. See generally, *Twelve John Does II*, 861 F.2d at 299 (discussing options for the District of Columbia to rearrange the use of space in the prison system to comply with consent decree).

### B. The Moving Party Should Have the Burden Of Showing That the Change Is Necessary To Achieve, and Is Consistent With, the Original Purposes of the Consent Decree

#### 1. The Consent Decree Should Be the Starting Point in Examining the Purposes of the Decree.

When a court considers a request for modification, it should start by examining the essential purposes of the consent decree. See *Badgley v. Santacroce*, 853 F.2d 50 (2d Cir. 1988) ("Badgley IV") (defendants have the burden of proof when seeking to modify a consent decree and must show

that modification will not impede compliance with the essential purposes of the decree). A consent decree reflects the balance struck by the parties in exchange for avoiding or terminating litigation. See *International Ass'n of Fire-Fighters v. Cleveland,* 478 U.S. 501, 528 (1986) ("A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating."); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) (entry into consent decrees is motivated by threatened or pending litigation); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) ("Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.")

Allowing defendants to disrupt this balance too easily would discourage plaintiffs from entering into consent decrees. As the Solicitor General has stated, "[a] standard that allows uncontested modifications too freely may inhibit litigants from entering into consent decrees in the first instance." Brief for the United States as *Amicus Curiae* at 11.

Courts should assess the original purposes of the decree based on a practical interpretation of the consent decree itself. The consent decree particularizes the general constitutional issues raised in the original complaint. "[T]he resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve . . . . [T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy one of the parties to it." *United States v. Armour & Co.*, 402 U.S. at 681. As the Solicitor General suggests, the party opposing modification should not be

deprived "of the benefit of its bargain." Brief for the United States as *Amicus Curiae* at 29. The test Petitioner Rufo suggests -- to define the purposes of the consent decree as coterminous with external constitutional, statutory or regulatory requirements, (see Brief of Petitioner Rufo at 32) -- ignores this Court's recognition that consent decrees embody the agreement of the parties.

The interests of the inmates in this case should not be articulated as an abstract interest in obtaining constitutional prison conditions. Instead, the extent to which specific goals for addressing problems identified in the consent decree are met should be the standard measured in addressing the interests of the inmates. At the same time, a court analyzing a modification request should look to the *practical* purposes of the consent decree and allow a consistent modification, rather than assuming that all standards set in the decree should remain unchanged over time. For instance, the somewhat circular suggestion by the court in *Ruiz* that the primary purpose of the decree was to reduce overcrowding "through use of facilities meeting agreed-upon standards," may have lacked the necessary flexibility. See *Ruiz*, 811 F.2d at 862. Courts should have the discretion to modify even explicit consent decree provisions in order to achieve the underlying practical purposes of the decree.

**2. The Modification of One Provision Should Be Favored If It Would Assist in Achieving a Paramount Practical Objective of the Decree.**

The reviewing court should be more willing to grant a modification if the moving party shows that postponing or altering an aspect of the consent decree would achieve another more important objective of the decree. In *Carey*, the Second

Circuit found that only by modifying the consent decree to allow the placement of mentally retarded children in fifty-bed facilities, rather than the fifteen- or six-bed facilities required by the decree, could the defendants achieve the paramount purpose: relocation of 2,368 residents residing in large institutions. The court found that the modification in the number of beds allowed in each facility would achieve the more important goal of relocating the residents within a reasonable time period. *Carey*, 706 F.2d at 971. Courts reviewing requests for modification in the prison context have also balanced consent decree objectives. See, *e.g.*, *Badgley IV*, 853 F.2d at 51-52 (allowing population increase in dormitory if the additional beds were used to secure compliance with consent decree provisions against double-celling and use of cots); see also *Ruiz v. Lynaugh*, 811 F.2d 856 (5th Cir. 1987) (denying modification request as inconsistent with overall purposes of consent decree).

In addition to the prior instances of modification and refusals to modify the Lorton decree discussed above at pages 9-11, we have on numerous occasions agreed to modifications that were consistent with the original purposes of the decree. We agreed to a temporary 10 percent increase in the population limit during 1985 and 1986 to permit defendants to remove inmates from and renovate certain cellblocks elsewhere at Lorton, provided that the number of officers assigned to the Central Facility was increased during the period of the temporary increase. We have modified the consent decree's procedures for environmental and safety inspections when the originally-agreed procedures proved to be cumbersome and needlessly bureaucratic. We are in the process of modifying the health-care staffing requirements because experience has shown that better care can be delivered by a more highly qualified but smaller staff.

We have not, however, agreed to perpetual modification of the Lorton Central consent decree population limit, without promise of other improvements, in response to mere allegations of unanticipated increases in the prison population. The district court ruling upholding our refusal was sustained on appeal. *Twelve John Does II*, 861 F.2d at 298.

A permanent relaxation of the population lid without any compensating measures, such as the one in *Plyler*, and the one requested by Sheriff Rufo in the district court case below, should be granted only in unusual circumstances. See *Badgley IV*, 853 F.2d at 54 ("Where, as here, a consent decree aims to achieve precise objectives at a single location, modification of essential provisions ought to be disfavored until those seeking change demonstrate that they are in substantial compliance with the decree and that the proposed change will have no adverse effect on future compliance."); *Ruiz*, 811 F.2d at 862-63 (upholding district court refusal to alter population lid even temporarily because modification would not serve consent decree's overall purpose).

### C. A Court Assessing Good Faith Efforts To Comply Should Examine the Reasons for Noncompliance and Defendants' Efforts To Explore Feasible Alternatives to Modification

Courts of appeals disagree about what factors should be taken into account in assessing the good faith factor in the modification test. We believe that the burden on the moving party should include demonstrating the absence of feasible alternatives. The experience of the Lorton inmates in the District of Columbia has been that, when prompted by the court to do so, the corrections officials have managed to come up with feasible alternatives. Despite defendants' threats in

the Lorton Central litigation that enforcement of the decree would cause a closure of the jails and the release of newly arrested suspects, the District of Columbia defendants have developed a number of alternatives to uncontrolled inmate releases. They have implemented an electronic house-arrest program for approximately 200 inmates. They are building new facilities that will provide drug treatment as well as incarceration. They have increased the amount of halfway house space, implemented a good time credits act, and increased funding for drug and employment programs designed to reduce recidivism. They have established a bond-reduction program that has resulted in the release of indigent pre-trial jail inmates being held in default of low bond amounts. They have rented prison space in other jurisdictions (a fairly costly stopgap arrangement which is gradually being phased out).

The District has also implemented an emergency release statute that has succeeded, with the application of minimal criteria, in releasing inmates who have a much lower recidivism rate than inmates who are released through conventional parole. Defendants' own statistics showed that inmates released through the early-release mechanism had a significantly lower recidivism rate (approximately 20 percent) than did inmates who were released through the conventional parole processes (approximately 50 percent). There is no evidence that enforcing the Lorton Central decree in the District of Columbia has resulted in the release of dangerous inmates. Instead, prison officials and the city government have introduced innovative and successful programs to maintain the prison population at the limit set in the consent decree.

In the rare case where no such alternatives are available, or the alternatives are inadequate to deal with a demonstrable threat of harm to the public, the modification granted should be a temporary one. For instance, in *Duran*, the court granted a modification for seven weeks until new prison spaces became available. *Duran v. Elrod*, 760 F.2d 756, 758 (7th Cir. 1985) ("*Duran II*").

The defendants should not be allowed to escape the consequences of a consent decree by claiming that other public officials appropriated inadequate funds or otherwise thwarted compliance. As Judge Mikva wrote when District of Columbia prison officials claimed that other District government officials were preventing consent decree compliance, "Counsel would have this court accept some kind of schism between the District government and the District's prison system . . . . [p]atently, the District government is viewed as an entity in this court, and its *inter se* problems cannot excuse the District's legal commitments." *Twelve John Does II*, 861 F.2d at 299-300. The district court in this case faced a situation in which the defendants claimed that they had to release inmates because of overcrowding. The district court found that the releases were the result of the defendants' failure to appropriate enough money to house the inmates, and rejected the Sheriff's request for modification. Pet. App. 13a. See also Brief of International City Management Assoc., *et al.* as *Amici Curiae*, at 12 ("The mere fact that compliance with a decree is more expensive than contemplated, or that state or local revenues are lower than in the past, would not in our view ordinarily constitute the type of burden that would, without more, warrant modification of the decree.").

If, however, a court were confronted by defendants who had enough money appropriated to house the incarcerated

inmates, but were simply unable to house the inmates due to a temporary condition, a short-term modification of the consent decree might be appropriate. Temporary inability to comply with the terms of the consent decree might arise in situations such as damage to a prison from a fire or flood, which could force prison officials to move inmates to another prison where they would have to be double-celled. Timing problems, such as those faced by the defendants in *Duran II*, may also be an adequate basis for temporary modification. See *Duran II*, 760 F.2d at 758 (allowing seven week modification permitting double-celling until renovations and a new building would add 738 new beds in the jail).

### D. If the Other Elements Of the Test Are Not Met, Only Temporary Modifications Should Be Permitted, and Even Then Only If the Moving Party Shows That Enforcement Would Demonstrably Harm the Public Welfare

The allegation that enforcing a prison population lid harms the public interest has been made many times in the District of Columbia, as well as by the petitioners in this case. See *Twelve John Does II*, 861 F.2d 295, 297 (D.C. Cir. 1988) ("The District contends that . . . forced compliance [with the terms of the consent decree] would imperil the public interest by requiring release of prisoners."); Brief for Petitioner Robert C. Rufo at 38-40. Such allegations, unless supported by specific evidence of harm to the public, do not justify a consent decree modification.

Defendants frequently play on the fear of the courts and the public that dangerous criminals will be let out into the streets if defendants' promises are enforced. See *Plyler*, 846

F.2d at 213 ("compelling the State to achieve compliance through the early release of massive numbers of inmates would create substantial dangers . . . ."); *Duran II*, 760 F.2d at 757-63 (allowing double-celling after consideration of public interest); *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981) (en banc) (same). See also Brief of United States as *Amicus Curiae* at 24.

As recounted above, our experience in enforcing the Lorton Central consent decree indicates that threats to the public interest may often be exaggerated for the purposes of litigation. In 1988, the United States Court of Appeals for the District of Columbia Circuit upheld the district court denial of defendants' requests for a modification of the Central Facility's population lid, despite defendants' nonspecific threats of danger to the public. See *Twelve John Does II*, 861 F.2d at 302 (affirming refusal to modify consent decree on the mere basis of an increase in the number of prisoners resulting from increased drug convictions and defendants' unsupported allegations of public danger); *Twelve John Does v. District of Columbia*, 855 F.2d 874, 877 (D.C. Cir. 1988) ("*Twelve John Does* I") (denying modification request based on foreseeable overcrowding). When forced to comply with its obligations, the District of Columbia has responded with a number of innovative programs which lowered the number of inmates to meet the prison population lid, while at the same time not increasing the threat to the public. See *supra* p. 22.

We do not contend that enforcement of a consent decree will never harm the public interest. In certain cases, it may be appropriate to modify a consent decree to meet a demonstrable threat to the public interest. For instance, in *Duran II*, defendants appear to have presented a credible showing of public harm. The Seventh Circuit found that a

significant percentage of released detainees became fugitives or committed serious felonies when released. Under these circumstances, the court allowed double-celling for a seven week period. *Duran II*, 760 F.2d at 760-61, 763.

In the case under review, defendants have made no well-supported showing of a threat to the public from the release of prisoners or other methods of compliance with the consent decree. The district court should only consider modifying the consent decree if the Sheriff demonstrates a quantifiable threat adequate to support such a finding.

## IV. THE APPLICATION OF OUR SUGGESTED TEST TO THE DECISION OF THE DISTRICT COURT

If this Court elaborates the four-part standard as we have recommended above, the district courts will have a set of principles on the basis of which they can make fuller findings of fact. The district court here lacked such a statement of principles, and accordingly its findings are not as complete as might be expected in the future. Nonetheless, we believe that the district court's opinion is amply supportable under our proposed standard and ought to be affirmed. The Sheriff did not demonstrate that the current situation met the three principal elements of the flexible modification standard. Nor did he show that a demonstrable threat to the public welfare justified modification in spite of his failure to meet his burden of persuasion as to the other three elements.

The Sheriff's argument, that the increase in the pretrial detainee population since the entry of the consent decree was an unforeseen change in circumstances justifying modification, Pet. App. 10a, did not satisfy his burden under the proposed standard. This failure to show changed circumstances

provides a sufficient ground to uphold the district court decision. The district court found that there had been a steady increase in the inmate population since 1985. Since the trend was apparent, it did not warrant a modification even if the increase was beyond the control of the Sheriff. Pet. App. 11a. There is no indication that the plaintiff inmates assumed the risk of such increases under the consent decree. The Sheriff made no effort to show either that the requested modification would be temporary while he searched for other solutions to the growing population of pretrial detainees, or that he had any plans to attempt to meet the consent decree goals at a later date.

The Sheriff also failed to show that the proposed modification was consistent with the practical purposes of the consent decree. Pet. App. 12a. Instead, he suggested that the alleged compliance of the proposed modification with constitutional standards was an adequate basis to support modification. The district court sensibly rejected this analysis because it would undermine the value of consent decrees as negotiated agreements between the parties. Pet. App. 12a. In holding that the purposes of the decree required enforcement of the single-celling requirement, the court did not merely equate the provisions of the decree with its purposes. The record shows that double-celling in cells that were intentionally designed to provide privacy for their solitary occupants, absent some physical modification to those cells, would pose grave security risks. 90-954; 90-1004 Resp. 9.

Although the district court did not explicitly examine the good faith efforts of the Sheriff to comply with the consent decree, it effectively considered this prong of the proposed standard and found that the Sheriff had failed to meet his burden of persuasion. Pet. App. 13a. In response to the

Sheriff's argument that some pretrial detainees might be released if the modification was not granted, the district court pointed out that such a release would not justify a modification, but would only indicate that public officials had failed to provide the Sheriff with adequate resources to allow compliance. Pet. App. 13a.

Since the Sheriff failed to carry his burden as to these three elements of the modification standard, the district court's decision denying modification was proper absent a showing that enforcement of the decree could pose a demonstrable threat to the public welfare. Although the Sheriff claimed that failure to grant the proposed modification might result in the release of some pretrial detainees, the district court rejected such a basis for modification. Pet. App. 13a. The Sheriff failed to show the particular nature of the threat and the absence of alternatives, and he did not seek a temporary modification, but rather a permanent one. The district court thus properly denied modification.

## CONCLUSION

The Court should affirm the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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